UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

EXPRESS LATINO, INC.

Employer

and

AUTO LIVERY CHAUFFEURS, EMBALMERS, FUNERAL DIRECTORS, APPRENTICES, AMBULANCE DRIVERS AND HELPERS, TAXICAB DRIVERS, MISCELLANEOUS GARAGE EMPLOYEES, CAR WASHERS, GREASERS, POLISHERS AND WASHRACK ATTENDANTS, LOCAL 727 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

and

LOCAL 955, UNITED SERVICE WORKERS OF AMERICA, TRANSPORTATION COMMUNICATION UNION, AFL-CIO-CLC[1]

Intervenor

Case 13-RC-20577

CORRECTED DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(*c*) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(*b*) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[2] in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

3. The labor organization(*s*) involved claim(*s*) to represent certain employees of the Employer.[4]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(*c*)(*1*) and Section 2(*6*) and (*7*) of the Act.[5]

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(*b*) of the Act:[6]

All full-time and regular part-time bus drivers employed by Express Latino at its O'Hare International Airport operations, excluding all office, clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION*

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(*s*) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(*s*) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they

were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Auto Livery Chauffeurs, Embalmers, Funeral Directors, Apprentices, Ambulance Drivers and Helpers, Taxicab Drivers, Miscellaneous Garage Employees, Car Washers, Greasers, Polishers and Washrack Attendants, Local 727 International Brotherhood of Teamsters, AFL-CIO; Local 955, United Service Workers of America, Transportation Communication Union, AFL-CIO-CLC; or by neither.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of the full names voters and their addresses which may be used to communicate with them. ***Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994).** Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all of the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in **Suite 800, 200 West Adams Street, Chicago, Illinois 60606** on or before **May 9, 2001**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570.** This request must be received by the Board in Washington by **May 16, 2001.**

DATED May 2, 2001 at Chicago, Illinois.

/s/ Harvey A. Roth
Acting Regional Director, Region 13

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*/ The National Labor Relations Board provides the following rule with respect to the posting of election notices:

(a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Director in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objection to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Director at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

1/ The names of the parties appear as amended at the hearing

2/ The arguments advanced by the parties at the hearing and in their post-hearing briefs have been carefully considered. In its post-hearing brief, the Intervenor contends that there was no authority to process the instant petition because a prior petition filed by the Petitioner in Case 13-RC-20565 involving this Employer and the same unit was withdrawn by the Petitioner, and the withdrawal was approved by the Regional Director on April 5, 2001 with prejudice to refiling the petition for six months. The record shows the parties at the hearing herein were informed that the April 5, 2001 letter erroneously included the prejudice period as no hearing had opened in the Case 13-RC-20565 and no election agreement had been reached. The parties were informed that a corrected letter approving the withdrawal of the previous petition without prejudice would issue. The corrected withdrawal approval letter in Case 13-RC-20565 issued on April 13, 2001. Inasmuch as the parties were fully informed at the commencement of the hearing herein about the erroneous inclusion of the prejudice period in the withdrawal approval letter in Case 13-RC-20565, I find that parties were on notice that there was no impediment to processing the instant petition and no one was prejudiced in any way by the Region proceeding with the processing of the instant petition.

3/ The Employer is a corporation engaged in transporting travelers throughout O'Hare Airport. The petition originally named Express Latino, Inc. and Hudson General, LLC (Hudson General) as joint employers of the employees in the petitioned for unit. Hudson General was served a notice of hearing, appeared at the hearing, but did not participate as a party at the hearing. At the hearing, the Petitioner amended the petition to name only Express Latino, Inc. as the Employer of the employees in the petitioned for unit. No one at the hearing or in their post-hearing briefs have contended or taken a position that all potential joint employers were required to be named and that their relationship should have been litigated at the hearing. Indeed, the Intervenor takes the position in its post-hearing brief that the Petitioner was free under the Board's decision in *M. B. Sturgis, Inc*., 331 NLRB No. 173 (August 25, 2000) to designate "either or both of the potential employing entities."

4/ Local 955,United Service Workers of America, Transportation Communication Union, AFL-CIO-CLC, (herein referred to as USWA) intervened based upon having been voluntarily recognized as the collective-bargaining representative of the employees of the Employer sought by the Petitioner in the instant petition.

5/ The Petitioner (herein referred to as Local 727) filed the instant petition to represent the drivers of Express Latino, Inc. The Intervenor asserts that the petition should not be processed because Express Latino lawfully recognized the USWA as the exclusive bargaining representative of its employees, and is currently negotiating an agreement.

FACTS

Express Latino was contracted by Hudson General to staff and manage drivers at O'Hare Airport. Under the agreement between Express Latino and Hudson General,

Express Latino is responsible for all labor related services including hiring, training, supervision, discipline, discharge, payroll, and payment of payroll taxes for employees who drive Hudson General vehicles. Hudson General is indemnified if any of the Express Latino drivers incur liability as a result of acts within the scope of their employment. The agreement came about in early 2000, and was precipitated by Hudson General's desire to contract with a minority owned business, like Express Latino.

Individuals interested in employment with Express Latino generally visited the main office of Express Latino located at 3230 West 38th Street ("38th Street"). Some applicants who called the 38th Street office of Express Latino were informed that Express Latino kept employment applications in a trailer located at O'Hare Airport. Any individual not holding a CDL license and hired by Express Latino had to complete the entire training process at the 38th Street location. All personnel files and employment applications are housed at the 38th Street location. All discipline and employment decisions emanate from the 38th Street location.

In around March 2000, Kevin Nolan, USWA Business Agent, called Henry Gardunio, Vice President of Express Latino, and asked Gardunio if he had any problems with USWA coming to O'Hare to organize Express Latino employees. Gardunio, acting under the assumption that he needed to be a union contractor, informed Nolan that he had no objections to Nolan organizing employees. In June 2000, Frank Lepore and Nolan, both Business Agents for USWA, began to organize the drivers employed by Express Latino. Eventually, the USWA determined that they had collected sufficient signatures for a showing of majority of support and made a demand of recognition upon Express Latino.

Express Latino and the USWA representatives agreed to submit the signed representation cards to a neutral arbitrator and agreed to be bound by the results of the arbitrator's decision. On August 10, 2000, Eugene T. Coughlin, Arbitrator, certified the USWA as the designated bargaining agent for Express Latino employees.[i]

Thereafter, the Employer and USWA started negotiating a contract for employees. The bargaining consisted of a series of about 10 unscheduled telephone calls. Garduino and Nolan were in charge of negotiations for their respective organizations. It is unclear what if any bargaining the two may have engaged in. Subsequently, Nolan resigned from

[i] At the hearing, the Petitioner wanted to litigate the lawfulness of the Employer's recognition of the Intervenor. The Hearing Officer precluded litigation on this issue but indicated that the Petitioner could make an offer of proof. No offer of proof was made. There is no dispute that the Intervenor was granted recognition on August 10, 2000. At the time of the hearing herein on April 10, 2001, more than six months had passed from the time the Intervenor was granted recognition. Under long standing precedent, it is clear that after a lapse of more than six months the Board will not entertain a challenge to an employer's grant of recognition to a labor organization. *Bryan Mfg*. 362 U.S. 411 (1960); see also, *Casale Industries*, 311 NLRB 951, 953 (1993). Accordingly, the Hearing Officer correctly precluded litigation on this issue at the hearing, and the lawfulness of the Employer's recognition of the Intervenor as the bargaining representative of certain of its employees is not at issue herein.

the USWA in January 2001, leaving Lepore in charge of the Express Latino negotiations. It is interesting to note that while Nolan left the USWA in January 2001, Express Latino's principal, Gardunio, only learned of the departure on April 10, 2001.

Lepore also testified that even as late as April 10, 2001, he was still in the midst of going through notes left by Nolan with regard to any shops he was handling, and Lepore had no idea what agreements may have been reached with Express Latino. Further, Lepore failed to produce any bargaining notes in connection with discussions with Express Latino.

Lepore has not met any unit member to discuss negotiations, or to solicit bargaining committee members. Lepore has not received an updated employee list since soon after the August 2000 recognition. Lepore has never met in person with Gardunio to bargain over terms and conditions of employment. Lepore is unaware of the size of the unit. Lepore asserts employees are paid $9.00 an hour to start, with a $.25 increase every 6 months, while Guardino asserts that employees are paid $9.00 an hour with an increase every 3 months.

There is no evidence that the parties have made an actual agreement to any term or condition of employment. Neither party has submitted any proposals or written documents to memorialize any progress in bargaining. Neither party produced bargaining notes, agreed proposals, or any indicia of progress with respect to arriving at any agreement. Indeed, Express Latino's principal is not sure he has ever met Lepore, the Business Agent who has been in charge of the Express Latino bargaining unit since at least January 2001. The parties appear to have stalled on negotiations in regard to the proposed wage rate for employees. The Employer stated that if they grant a wage increase, they will lose the contract, and the Union's only position was seeking a $2.00 an hour raise per year.

Local 727 filed a petition to represent Express Latino drivers currently located at the O'Hare location. The petition was filed on March 27, 2001.

ANALYSIS

The Board encourages voluntary recognition and bargaining by permitting the parties "a reasonable time to bargain and to execute the contracts resulting from such bargaining." *Keller Plastics Eastern, Inc*., 157 NLRB 583, 587 (1966). When an employer voluntarily recognizes a union, the parties are entitled to rely on "the continuing representative status of the lawfully recognized union for a reasonable period of time." *Blue Valley Machine & Mfg. Co*., 180 NLRB 298, 304 (1969). This presumption of continuing majority status is not based on an absolute certainty that the union's majority status will not erode. Rather, it is a policy judgment which seeks to ensure that the bargaining representative chosen by a majority of employees has a reasonable opportunity to engage in bargaining to obtain a contract on the employees' behalf without interruption.

A reasonable time is not measured by the duration spent on bargaining, but upon what transpired and what the parties accomplished during bargaining sessions. *Ford*

Center for the Performing Arts, 328 NLRB No. 1, slip op. at 1 (April 7, 1999). The Board examines the unique factual circumstances of each case to determine if the parties had sufficient time to reach agreement, by considering the degree of progress made in negotiations, the lack of an impasse, and whether the parties were negotiating for an initial contract. The Board is reluctant to frustrate good-faith bargaining and negate fruitful negotiations for an initial contract when the parties are on the verge of reaching a final agreement. *N. J. MacDonald & Sons, Inc*., 155 NLRB 67, 71 (1965).

It is the opinion of the undersigned that a reasonable period of time to bargain had passed by the time the petition was filed herein. As an initial matter, the instant unit did not possess any unique or complex attributes that contributed to a delay in reaching agreement. Indeed, the unit consists of only about 20 drivers, all of whom apparently perform a similar function. The parties have had since August 10, 2000, and failed to produce any sign of proposals, counter proposals, or agreements. In these circumstances, a few telephone calls do not rise to the level of meaningful discussions. Moreover, none of those telephone calls produced either a date to meet and bargain in person, or any agreement, even on minimal issues. The Employer did not even know with whom from the USWA he was talking to in some of the telephone calls mentioned. Finally, absent from the negotiations are any indications of a proposal to deal with the wage rates for drivers. The employer simply states he can only afford what he currently pays, while the Union states it would like a $2.00 an hour increase each of the contract years[ii].

The instant case is distinguishable from *MGM Grand Hotel*, 329 NLRB No. 50 (September 30, 1999), cited by the Intervenor. In that case the Board concluded that a reasonable time to bargain had not elapsed more than eleven months after the grant of recognition and dismissed three decertification petitions. In that case, unlike the situation herein, the record showed that the parties diligently engaged in extensive negotiations, attempted to reach agreement, avoided impasse, and consistently expressed their desire to both complete negotiations and execute a contract. Most importantly, in *MGM Grand Hotel*, the contract itself was being created from the ground up, and the parties were attempting to create a "living document" sufficiently flexible to engender a very large and complex work force. The Employer, MGM Grand, was among the largest hotels in the world and its operations were among the largest on the Las Vegas strip. The unit exceeded 3000 employees in 53 classifications. None of these factors are evident herein.

The unit in the instant case is small and fairly homogeneous, nether requiring the scale or complexity of negotiations involved in the *MGM Grand* case. Neither the Employer nor the Intervenor has been particularly diligent in pursuing negotiations, nor is there any evidence in the record of any great desire by either the Employer or the Intervenor to define issues, reach agreements on issues, or to complete negotiations and execute a contract. In short, there are no fruitful negotiations after more than eight undisturbed months to engage in negotiations. In view of the lack of fruitful negotiations, the passage of more than eight months to engage in negotiations, and the fact that this is a relatively small and homogeneous unit, I find that a reasonable period of time has passed and that the Employer's voluntary recognition of the Intervenor does not serve as a bar to the processing of the instant petition.

[ii] Not even the duration of the contract has been discussed by the parties.

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6/ The description of the unit is in keeping with parties stipulation of the appropriate unit herein. There are approximately 20 employees in the unit found appropriate.

347-2067-3300
347-2067-6700
177-1650